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Understanding Union Security and its Effects[1]

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Introduction

SINCE THE MIDDLE of the last century, Canadian labour law has generally ensured that all workers who benefit from collective agreements contribute to the costs of maintaining that agreement through their union dues. This system provided unions, once certified or recognized on the basis of demonstrated majority support, with access to the financial resources needed to carry out their work. Today, however, these union security arrangements are under attack, both within Ontario and elsewhere in Canada. This paper will first review the proposals being put forward in Ontario that would threaten union security. Then it will summarize U.S. research regarding the impacts of various legislative restrictions on union security, with an eye towards understanding the implications of the American experience for Ontario.

Part I: The Coming Threat to Union Security in Ontario

UNION SECURITY ARRANGEMENTS are rules that ensure unions can continue to consistently represent workers in a workplace. Among other features, these rules require workers in a legally-constituted bargaining unit to be union members and/or to pay union dues. The foundation of union security in Canada is the Rand Formula, which is based on a simple premise: since unions have a legal responsibility to negotiate on behalf of everyone in the bargaining unit (also known as the "duty of fair representation"), it is fair and reasonable to require all workers in a unionized workplace to pay union dues toward the maintenance of the collective bargaining system that they all benefit from.

Therefore, if mandated by the majority choice of workers in a bargaining unit, the Rand Formula states that all workers in a unionized workplace should pay dues through a check-off clause. In some applications, the Rand model does provide a limited opportunity to opt out of union dues and have them diverted to a charity, but only on religious grounds. Overall, the Rand Formula is an essential pre-condition for the financial viability of unions, and the whole collective bargaining system.[2]

The Rand Formula was developed by Supreme Court Justice Ivan Rand, through his famous 1946 arbitration decision that ended a 99-day work stop-

page at Ford Motor Co. in Windsor. The strike had been sparked by the employer's refusal to accept any form of union security arrangement. In Rand's view, union security arrangements (implemented only once a bargaining unit has been certified on the basis of majority support from the workers in that unit) were vital because organized labour is the "necessary co-partner of capital" and "must be available to redress the balance of what is called social justice."[3]

Union security in Canada has many important functions. It promotes fairness by avoiding "free-riders": that is, workers who benefit from the collective agreement but do not pay dues. It also fosters labour relations stability by avoiding work stoppages over the issue of mandatory dues payment or dues check-off clauses. More broadly, union security arrangements help to ensure that unions have the resources to adequately represent workers who choose to unionize. Unions can then act as a positive, progressive force in society, one that advocates for social justice in broader debates (including on subjects like health and safety standards, minimum wages, and income security programs), and helps to generally counter-balance the power of corporations and the wealthy. For these reasons, the Rand Formula or similar approaches to union security have been a standard feature of labour law and collective bargaining in Canada for decades. But this long-standing consensus is once again being threatened.

In Ontario, the Progressive Conservatives launched a direct attack on the principles of union security in a White Paper, "Paths to Prosperity: Flexible Labour Markets," released in June 2012. The paper indicates that, if elected, the party would implement the following measures to undermine union security:

- Outlaw "fair share" union dues. In other words, prohibit the Rand Formula;
- Ban arrangements that make union membership a condition of employment;
- Make union leaders collect dues instead of employers;[4]
- Impose onerous financial reporting requirements on unions; and
- Place limits on union-funded advocacy and political action.[5]

Conservative MPP Randy Hillier, co-author of this White Paper, wrote a somewhat confused op-ed in the *Windsor Star* (published in January 2013) to explain the party's proposal. In it, he claims to actually support the Rand For-

mula — because in addition to banning mandatory dues payment, he would let workers in unionized workplaces individually opt out of being a member of the bargaining unit:

> "His [Rand's] decision was fair and sensible and our proposal stands by that decision. In the last session of the legislature, I tabled a bill, which formed the basis of our proposal. The bill would have allowed workers to opt out of a bargaining unit, its union and its collective bargaining agreement altogether."[6]

But Hillier's argument misrepresents the true rationale behind the Rand Formula and similar legislation. It is not to make participation in the bargaining unit an individual choice, thus creating the potential for a confusing and unstable mixture of contractual arrangements in any workplace, and ultimately destroying the possibility that workers could ever improve their lot through democratically-determined collective action. To the contrary, Justice Rand ratified collective bargaining as a positive force in society as a whole. It was to that end that Rand recognized the importance of establishing a stable, majority-based decision-making process, which has been replicated by decades of labour law since. Workers in any workplace should be able to decide, by majority support, to establish a collective bargaining unit, and if they do so then that democratic decision must be underpinned with financial arrangements to ensure the bargaining relationship can be stable and sustainable. There is nothing "forced" or "involuntary" about this practice; it always depends on continuing support for the bargaining unit expressed through the certification process, and the ratification of the resulting contracts.

Hillier's muddled statements, his subsequent private members' bill,[7] debates at the Progressive Conservative Policy Conference in fall 2013,[8] and Hudak's February 2014 announcement to the Toronto Board of Trade that he is "not going to change the Rand Formula"[9] suggest that the party is struggling to agree on coherent messages and arguments to broaden support for their plan to dramatically change labour laws. Some within the party clearly believe that a direct attack on the Rand Formula is not politically palatable in Ontario.

Yet under Tim Hudak's leadership, the party's commitment to implementing anti-union legislation if elected has not wavered. In fact, documents leaked in November 2013 confirmed that in the event that an election had been called in spring 2013, dramatic changes to labour law would have been a core piece of the Progressive Conservative election platform. More-

over, the party's province-wide "Made in Ontario Jobs Tour" launched in November 2013 included proposed changes to labour law as a central feature[10] — measures that they misleadingly claimed would bring jobs to the province.[11] Most recently, in Hudak's speech to the Toronto Board of Trade, after downplaying changes his party would make to the Rand Formula, he emphasized that their "agenda is a lot bigger and more ambitious."[12]

In contrast to the Progressive Conservatives, both the Liberals and NDP have opposed proposals to prohibit or weaken union security arrangements. NDP leader Andrea Horwath has called the Conservative proposals "wrong-headed,"[13] while NDP MPP Cheri DiNovo has said that they are not just an attack on workers' rights, but also on civil rights and democracy.[14] The Liberal Minister of Labour, Yasir Naqvi, has also spoken out against the Conservatives' proposals and has said that the Rand Formula helps to ensure that workers' earn fair wages, avoiding a race to the bottom.[15]

Part II: Learning from the American experience

The Origins of American Anti-Union Laws

IN 1935, THE *Wagner Act* was passed in the United States, establishing the right of workers to organize and allowing for democratically-determined union security arrangements. Only 12 years later, however, in the face of strident pressure from the business community, the framework for U.S. labour law was amended through the *Taft Hartley Act*. This Act watered down many of the rights that had been afforded to labour in the original *Wagner Act*. One of these provisions gave individual states the ability to adopt laws that ban union security arrangements outright.[16] These laws have misleadingly become known as "right-to-work" legislation. There is no right to employment provided by these laws at all, nor do they enhance more "freedom" in labour relations; rather, they constitute an intrusion into free collective bargaining, prohibiting participating parties (employers and bargaining units) from agreeing on dues check-off or similar union security provisions.

It is important to remember that the *Taft Hartley Act* had its roots in the continuing racist and segregationist ideas that still held sway in the U.S. south in the mid-20th century.[17] Segregationist political leaders held particular disdain for unions because of their commitment to integrating workplaces and campaigning for equal pay.

Today, 24 states (most of them in the U.S. south) have adopted provisions that outlaw union security arrangements. The states that most recently adopted this approach were Indiana and Michigan. Most right-to-work laws, however, were passed in the 1940s and 1950s. Only six further states passed the measure between the 1960s and the present.[18] So it is hard to argue that right-to-work laws are a "modernizing" trend in labour law, as Progressive Conservative leader Tim Hudak has tried to claim. In fact, these laws date back to 1947 (just one year after the Rand Formula was first implemented!).

The Negative Impacts of Prohibiting Union Security

In the United States, prohibitions on union security under the *Taft Hartley Act* have had devastating impacts on workers. Most directly, they have dramatically reduced unionization rates. This, in fact, is the primary goal of the *Taft Hartley Act* restrictions. U.S. evidence shows that right-to-work states have substantially lower union density. Based on data collected in 2012, the unionization rate in right-to-work states averages 6.9 percent, compared to 16.2 percent in union security states. Right-to-work states hence have unionization rates of less than half of other states. The difference in public sector unionization rates is even more pronounced at 21.4 percent in right-to-work states, again less than half of the 52.4 percent coverage experienced in union security states.[19]

Predictably, significantly lower unionization results in lower wages. Average annual wages were $5,766 lower in right-to-work states than in the rest of the U.S., based on 2012 Bureau of Labour Statistics data.[20] A 2011 University of Notre Dame study also found that 18 of the 22 right-to-work states had median incomes below the national average.[21] According to a 2011 Economic Policy Institute (EPI) study that controls for 42 economic, demographic, and geographic policy factors, the isolated effect of right-to-work legislation alone is to reduce real wages by 3.2 percent.[22] This estimate is highly conservative, however, as it likely misses many of the indirect impacts of reduced unionization on wages; for example, the threat of employer relocation to right-to-work states has undoubtedly suppressed wages in the rest of the U.S., an effect that would not be captured by the preceding methodology. This well-documented wage-suppressing effect is felt by all workers, both union and non-union. In fact, research shows that in Oklahoma the downward pressure is even greater on non-union wages.[23] Due to this growing body of evidence, these laws have become more accurately known as "right-to-work-for-less" laws by their critics.[24]

Despite claims by proponents that these laws significantly improve economic performance and create jobs (claims that are echoed in Ontario Progressive Conservative literature), evidence shows otherwise.[25] Overall, data in the U.S. indicates that employment figures vary widely across right-to-work-for-less and union security states; this suggests that employment outcomes depend most importantly on many other factors than labour law (including macroeconomic conditions, demographic trends, and others). Rigorous studies that have tried to separate the impact of right-to-work-for-less legislation from other economic variables affecting job creation confirm this trend. Michael Hicks' 2012 study found that the impact of right-to-work-for-less legislation on the manufacturing sector differed greatly between states: some states experienced significant decline in the first years after the legislation was put in place, while others experienced large gains. He concludes that other factors impact the size of the manufacturing industry in a particular jurisdiction more than right-to-work-for-less legislation.[26] A 2009 Employment Policy Research Network study found that "right-to-work laws... seem to have no effect on economic activity."[27] Lonnie K. Stevans' 2009 research found that while per-capita income and wages are both lower in right-to-work-for-less states, the legislation had no significant impact on economic growth or employment.[28]

State-specific case studies also dramatically illustrate the failure of right-to-work-for-less laws to create jobs. For example, in Oklahoma throughout the 1990s, manufacturing employment increased steadily. Since the adoption of right-to-work-for-less laws in 2001, however, it has fallen every year.[29] This does not mean that right-to-work-for-less legislation caused this decline, but it does indicate that right-to-work-for-less legislation failed to deliver on its promise of job creation. In sum, the best evidence available demonstrates that right-to-work-for-less legislation does not significantly boost employment.

When challenging the argument that this type of legislation creates jobs, it is important to emphasize that even if companies relocate certain operations to jurisdictions where this type of anti-union legislation has been adopted, no net new jobs are created by the measure — jobs are simply reallocated. With this in mind, it becomes clear that the universal adoption of right-to-work laws would leave no specific jurisdiction with any remaining "advantage." All that would be achieved is a universal downward shift in unionization, wages, benefits, and working conditions. Furthermore, in order to continue the beggar-thy-neighbour effort to attract new companies, state or provincial laws would have to continue to become even more repres-

sive to maintain the desired anti-union "competitive advantage." This is a very dangerous strategy — one that sets off a continuing downward spiral in wages and working conditions.[30]

Limiting Union-Funded Political Action

In addition to right-to-work-for-less laws, another feature of the American labour relations landscape worth highlighting in the context of the current debate in Ontario is the strict limits that have been placed on union spending on political action.

In the United States, the Supreme Court has ruled on many occasions that the *National Labour Relations Act* (Section 8(a)(3)) does not permit a labour union to spend dues on activities that are unrelated to collective bargaining, if members object to such expenditures. This means that if employees opt out of union membership (*even* in states that permit union security arrangements), they may also opt out of the portion of their dues that does not go towards what have been deemed "core services." The legal definition of core services has varied, but always includes collective bargaining and contract administration. This right is sometimes known as the "Beck Right," because it was established most famously in the *Beck v Communications Workers of America* Supreme Court ruling in 1988.[31]

In the United States, some states have gone even further than simply enforcing Beck Rights, and passed legislation often known as "paycheque protection" legislation by its proponents or "paycheque deception" legislation by its opponents. The specific form of these measures varies state-by-state, but can include legislation that bans unions from spending any dues on political action; requires annual written permission from employees to deduct dues from their paycheque; outlaws automatic dues check-off altogether; or other forms of legislation that undermine union security by limiting union spending on political action. Various forms of this legislation have been adopted in several states.[32]

It is important to note that a very different legal precedent has been set in Canada on this issue. In 1991, Francis Lavigne (a member of OPSEU) objected to the use of his union dues for political causes, such as support for NDP-sponsored events and disarmament campaigns. The Supreme Court found that neither Lavigne's freedom of expression nor his freedom of association as guaranteed in the *Canada Charter of Rights and Freedom* was infringed, because he was still free to express his own personal views and associate with others who opposed the union.[33] One

of the judges even noted that an important function of the Rand Formula is to ensure that:

> "unions have both the resources and the mandate necessary to enable them to play a role in shaping the political, economic and social context within which particular collective agreements and labour relations disputes will be negotiated and resolved."[34]

Through this decision, the broader social value of unions, including their participation in broader social and political debates, has been clearly ratified by the Canadian courts, very much in line with the initial spirit of Justice Rand's arbitration.

Conclusion

THE FIRST THING to be learned from the American experience is that attacks on unions can take many different forms. Right-to-work-for-less laws outlaw union security arrangements, while "Beck Rights" and "paycheque deception" laws undermine union security through various means and limit union-funded advocacy and political action. Conservatives in Ontario have stated their intent to pass similar kinds of anti-union legislation and it is clear that the proponents are looking to their American counterparts for inspiration and guidance. Responses to Conservative proposals in Ontario would be strengthened by taking into account the various forms of anti-union legislation that have been pursued in the United States — and their damaging economic effects.

Drawing on research that has identified some of the broader impacts of this type of legislation can help to inform attempts to defeat these proposals. U.S. research on the impacts of right-to-work-for-less laws — including their failure to consistently stimulate job creation and economic growth — clearly demonstrates that these laws are part of a broader low-wage agenda. Structurally weakening unions through legal restrictions is a core part of this agenda. Anti-union measures are always justified by reference to the supposed "individual rights and freedoms" of workers, but their true effect is to make it more difficult for workers to improve their share of economic prosperity, by stymying democratic majority-driven decision-making in workplaces. Furthermore, the low-wage, anti-union agenda has also been a key factor behind the strong recent historical trend towards increasing inequality.

An equally damaging effect of laws that undermine union security, although harder to measure in quantitative terms, has been to undermine peoples' right to collective action and democratic expression. These laws prioritize "individual choice" over democratic, collective decision-making, and limit the ability of unions to engage in broader social and political advocacy. Consequently, anti-union legislation must also be understood as part of a larger plan to systematically obstruct democracy and silence opposition to the Conservative agenda. Highlighting the fundamentally anti-democratic nature of anti-union laws provides an opportunity for building broader public support to reject this approach and reinforce collective bargaining rights.

This is an important moment for Canadians to defend union security, and revitalize the principles of workplace democracy and fairness that underpin the labour movement. Conservatives across Canada are gearing up for an attack on unions and working people. However, research shows that what they present as "new," "flexible" ideas are actually long-standing anti-union policies that have resulted in clear negative impacts across the United States. Here in Ontario, the labour movement and its allies can learn from this research, and invoke its own history of supporting and protecting workers' rights, to ensure these proposals are defeated.

Notes

1 This paper builds on research completed for the Ontario Federation of Labour in February 2013 entitled "Working for Less: The Coming Threat to Union Security in Ontario," which is available online here: http://ofl.ca/wp-content/uploads/Working4Less.pdf

2 *Ford, supra* note 1, at 1371 in Debra Parkes, "The Rand Formula Revisited: Union Security in the Charter Era," *Manitoba Law Journal*, 2010, 34(1): 226.

3 *ibid*, 226.

4 The proposal recommends outlawing dues check-off clauses in the public sector and leaving them up to the discretion of employers in the private sector.

5 "Paths to Prosperity: Flexible Labour Markets," An Ontario PC Caucus White Paper, *Ontario Progressive Conservatives*, June 2012. http://ontariopc.uberflip.com/i/103096

6 Randy Hillier, "Guest Column: PCs explain party's labour policies," *Windsor Star*, January 18, 2013. http://blogs.windsorstar.com/2013/01/18/guest-column-pcs-explain-partys-labour-policy/

7 A Private Members' Bill sponsored by MPP Randy Hillier was carried through First Reading in the Ontario Legislature on May 1, 2013. *Bill 64, Defending Employees' Rights Act (Collective Bargaining and Financial Disclosure by Trade Unions)* was packed full of anti-union measures. Included among them are proposals that would outlaw clauses that make union membership a condition of employment, require unions to get written permission from members to spend union dues on political action, and require unions to provide detailed annual financial statements to the Minister of Labour. It also proposed repealing the Rand Formula and replacing it with an arrangement whereby workers could not be required to be members of the union, and would be able to opt out of being covered by the collective agreement and thus not pay dues. This proposal is inconsistent with the system of majority unionism that is the foundation of labour relations in North America. If passed, the bill would create division in workplaces and foster instability in labour relations.

8 The Canadian Press reported that Progressive Conservative delegates at the 2013 Policy Conference were divided about proposed changes to labour law. For example, it was reported that only 53 percent voted in favour of outlawing mandatory union membership. See: http://www.cp24.com/news/hudak-won-t-back-down-on-controversial-union-policies-1.1475468

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10 Richard Brennan, "Tory election document undermines Ontario unions, critics say," *Toronto Star*, November 11, 2013. http://www.thestar.com/news/queenspark/2013/11/11/tory_election_document_undermines_ontario_unions_critics_say.html

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14 Official Records for 11 April 2013, *Legislative Assembly of Ontario*. http://ontla.on.ca/web/house-proceedings/house_detail.do?Date=2013-04-11&Parl=40&Sess=2&locale=en

15 Official Records for 20 February 2013, *Legislative Assembly of Ontario*. http://www.ontla.on.ca/web/house-proceedings/house_detail.do?locale=fr&Parl=40&Sess=2&Date=2013-02-20

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19 Benjamin Collins, "Right to Work Laws: Legislative Background and Empirical Research," *Congressional Research Service*, January 6, 2014

20 "May 2012 State Occupational Employment and Wage Estimates," *Bureau of Labor Statistics*. http://www.bls.gov/oes/current/oessrcst.htm

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24 Including President Obama, who warned an audience in Michigan last year that the new rules would only give workers "the right to work for less money." For President Obama's remarks see: "President Obama's remarks concerning right to work for less legislation in Michigan," December 10, 2012. http://www.uaw.org/articles/president-obamas-remarks-concerning-right-work-less-legislation-michigan

25 Some economic evidence suggests right-to-work laws have a positive economic impact. For two discussions about why this data is selective and flawed see: Sylvia A. Allegretto and Gordon Lafer, "What's wrong with 'right-to-work': Chamber's numbers don't add up," *Economic Policy Institute*, February 28, 2011 and "Bad Work: A Review of papers from a Fraser Institute conference on 'right-to-work' laws" ed. Lynn Spink, *Centre For Research on Work and Society*, York University, Working Paper Number 16, July 1997, 28.

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